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## Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause

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# DISCRIMINATION, COERCION, AND THE BAIL REFORM ACT OF 1984: THE LOSS OF THE CORE CONSTITUTIONAL PROTECTIONS OF THE EXCESSIVE BAIL CLAUSE

*Samuel Wiseman\**

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## INTRODUCTION

Courts and commentators have long noted the importance of bail before trial in allowing the effective preparation of a defense, protecting the falsely accused from the extremely unpleasant and disruptive experience of being jailed, and maintaining the presumption of innocence.<sup>1</sup> Indeed, the Framers considered bail sufficiently important to merit inclusion in the Bill of Rights. The Eighth Amendment reads, in part, "Excessive bail shall not be required."<sup>2</sup> The Excessive Bail Clause, however, has been called "some of the most ambiguous language in the Bill of Rights," and has occasioned a great deal of debate among jurists and scholars.<sup>3</sup> This debate has focused largely on two questions: whether the Clause binds only the courts or Congress as well, and whether it creates any substantive right to bail.<sup>4</sup>

These questions finally came directly before the Supreme Court in a constitutional challenge to the Bail Reform Act of 1984, the

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1. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 4 (1951); Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970) [hereinafter Tribe, *An Ounce of Detention*].

2. U.S. CONST. amend. VIII.

3. Caleb Foote, *The Coming Constitutional Crisis in Bail (Part I)*, 113 U. PA. L. REV. 959, 969 (1965).

4. Perhaps because of this uncertainty, the Supreme Court has only indirectly applied the Excessive Bail Clause to the states through the Fourteenth Amendment. *Schilb v. Kuebel*, 404 U.S. 357 (1971) (dictum), cited in Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1248 (2002). The Court's extremely restrictive interpretation in *United States v. Salerno* has made this question largely moot. See *infra* Part IV.B.

first federal statute to allow the denial of bail for dangerousness.<sup>5</sup> In *United States v. Salerno*, Chief Justice Rehnquist, writing for five other members of the Court, strongly suggested that the Excessive Bail Clause limits only the discretion of the judiciary and found, at a maximum, an extremely attenuated substantive right to bail.<sup>6</sup> There has been relatively little innovation in the law and scholarship on bail in the twenty years since *Salerno*, and without renewed consideration of the core purpose embodied in the Excessive Bail Clause, the Clause will continue to be little more than empty verbiage. This Article argues that the Excessive Bail Clause, while granting no substantive right to bail, protects criminal defendants from governmental discrimination and coercion—protections that are eviscerated by the Bail Reform Act of 1984. Part I will provide a brief history of the Excessive Bail Clause. Part II will examine the interpretation of the Clause prior to *Salerno*. Part III will look at the procedures of the Bail Reform Act of 1984, and Part IV will discuss *Salerno*'s analysis of the Act. Part V will describe how the Bail Reform Act of 1984 fails to comport with the core constitutional purpose of the Excessive Bail Clause.

## I. A BRIEF HISTORY OF THE EXCESSIVE BAIL CLAUSE OF THE EIGHTH AMENDMENT

Although the history of bail in the Anglo-American system extends back to the Statute of Westminster I in 1275,<sup>7</sup> which dictated which offenses were bailable,<sup>8</sup> and even further to the earliest be-

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5. See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. §§ 3141–3156 (2006)); *infra* Part IV. While this Article focuses solely on bail and the Eighth Amendment, preventive detention also raises important due process questions which have been widely debated before and after *Salerno*. See, e.g., Albert A. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Hermine H. Meyer, *Constitutionality of Pretrial Detention (Part II)*, 60 GEO. L.J. 1381 (1972); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990); Tribe, *An Ounce of Detention*, *supra* note 1.

6. 481 U.S. 739, 753 (1987); see discussion *infra* Part IV.B.

7. See Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.), reprinted in 1 THE STATUTES AT LARGE, IN PARAGRAPHS, AND SECTIONS OR NUMBERS, FROM MAGNA CHARTA, TO THE END OF THE SESSION OF PARLIAMENT, MARCH 14, 1704, IN THE FOURTH YEAR OF THE REIGN OF HER MAJESTY QUEEN ANNE (London, Cambridge Univ. 1706) [hereinafter THE STATUTES AT LARGE 1704].

8. See William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 45-46 (1977). This statute was aimed at curbing the abuse of bail by sheriffs and other local officials rather than by royal judges, but nonetheless became an important statutory right in the conflict between the Stuarts and Parliament over imprisonment without cause shown or bail granted.

ginnings of criminal justice in England, the origins of the Eighth Amendment's Excessive Bail Clause can be more narrowly traced to the seventeenth century.<sup>9</sup> The struggle between the Stuart monarchs and Parliament led to three landmark pieces of legislation curtailing the exercise of royal prerogative and safeguarding individual rights: the Petition of Right in 1628,<sup>10</sup> followed by the Habeas Corpus Act of 1679,<sup>11</sup> and, finally, the English Bill of Rights in 1689,<sup>12</sup> which contains the "excessive bail ought not to be required" phrasing that, in modified form and after appearing in the Virginia Declaration of Rights, appears in the U.S. Bill of Rights.<sup>13</sup> This section will trace the history of the Excessive Bail Clause from its English roots to its inclusion in the Bill of Rights before examining, for context, other bail provisions of colonial and Revolutionary America.

### A. The Petition of Right

The Petition of Right of 1628 was a Parliamentary response to the King's asserted royal power to jail his subjects without showing cause. The unpopular Charles I, after failing to obtain funding from the Parliament of 1626 for his support of the King of France's efforts to repress French Protestant rebels, collected dues and demanded mandatory loans from his subjects.<sup>14</sup> In what has become commonly known as *Darnel's Case*, five knights were imprisoned by royal command after refusing to make the imposed loan.<sup>15</sup> Counsel for the defense sought, among other relief, release on bail through habeas corpus, arguing that "since the five knights stood

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9. For accounts of the earlier history of bail in England, see ELSA DE HAAS, *ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275* (1940); JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974); Duker, *supra* note 8.

10. Petition of Right, 1628, 3 Car. 1, c. 1 (Eng.), *reprinted in* 7 *THE STATUTES AT LARGE, FROM THE THIRTY-NINTH YEAR OF QUEEN ELIZABETH, TO THE TWELFTH YEAR OF KING CHARLES II INCLUSIVE* (London, Cambridge Univ. 1763) [hereinafter *THE STATUTES AT LARGE* 1763].

11. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), *reprinted in* *THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II TO THE LAST YEAR OF KING JAMES II INCLUSIVE* (London, Cambridge Univ. 1763) [hereinafter *THE STATUTES AT LARGE* JAMES II].

12. English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *reprinted in* 1 *THE STATUTES AT LARGE* 1704, *supra* note 7, at 1555.

13. See discussion *infra* Part I.D.

14. See Duker, *supra* note 8, at 58.

15. Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden, at the King's-bench in Westminster-hall, *reprinted in* 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 2 (London, R. Bagshaw 1809) [hereinafter *Darnel's Case*].

accused but not convicted, they should be freed on bail.”<sup>16</sup> If not, Sergeant Bramston, attorney for one of the knights, argued, the protections of English criminal procedure would be worthless against the King, and his client’s “imprisonment [would] not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually.”<sup>17</sup> Bail, in and of itself, was not the main issue in *Darnel’s Case*; rather it was “the discretionary power of the crown to imprison its subjects without notice of the cause”<sup>18</sup> and the use of this power to target the King’s political and religious opponents. The court, accepting the argument of the Attorney General, “ruled that the King (in the interests of preserving the state) had legal power to commit a person without showing cause.”<sup>19</sup> Further, without cause “the court had no basis for judgment: it could not question the royal right to commit, nor could it grant bail.”<sup>20</sup> As the court put it, “the King hath done it, and we trust him in great matters.”<sup>21</sup>

This decision angered many, and Parliament took up the issue in the following year, resulting in the Petition of Right.<sup>22</sup> The Petition, referring to *Darnel’s Case*, asked that “no freeman, in any manner as before mentioned, be imprisoned or detained.”<sup>23</sup> As Professor Caleb Foote notes, Parliament was aware during the debates over the Petition of the negative implications of the royal power of arrest without cause for statutory guarantees of pretrial release:

[T]here was repeated discussion of the fact that, if the decision in *Darnel’s Case* stood, it would impair the effectiveness of the Statute of Westminster the First of 1275<sup>24</sup> which governed admission to bail; thus Coke stated that “the cause of imprisonment must be known, else the statute will be of little force . . . .”<sup>25</sup>

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16. LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS 1689*, at 89 (1981).

17. *Darnel’s Case*, *supra* note 15, at 8.

18. Hermine H. Meyer, *Constitutionality of Pretrial Detention (Part I)*, 60 GEO. L.J. 1139, 1182 (1972) (citing 6 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 32–40 (1927)).

19. SCHWOERER, *supra* note 16 (internal citations omitted).

20. *Id.* (internal citations omitted).

21. *Darnel’s Case*, *supra* note 15.

22. SCHWOERER, *supra* note 16.

23. *Darnel’s Case*, *supra* note 15.

24. Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.), reprinted in 1 *THE STATUTES AT LARGE 1704*, *supra* note 7.

25. Foote, *supra* note 3, at 966–67 (quoting 3 How. St. Tr. at 69).

The protection of the Petition of Right against the Crown's power to use the criminal justice system against his enemies was limited, however, while the King still had a prerogative court like that of the Star Chamber. Parliament abolished this court in 1641 and in the same act<sup>26</sup> provided: that any subject imprisoned on royal authority would have a writ of habeas corpus from the Court of King's Bench or Common Pleas; that the jailer would then have to return to the court the true cause of imprisonment within three days and that the court would then be required within three days to deliver, bail, or remand the prisoner.<sup>27</sup> Both the Petition of Right and the Act of 1641 proved procedurally inadequate to protect individuals from imprisonment at the King's discretion, leading Parliament to pass the Habeas Corpus Act of 1679.

### B. The Habeas Corpus Act of 1679

In the years before the passage of the Habeas Corpus Act, both Oliver Cromwell and Charles II were able to imprison individuals without showing cause by exploiting procedural weaknesses in the existing laws, which did not cover persons imprisoned by order of the Secretary of State, persons whose cases had not yet been calendared by the jailer, or persons imprisoned outside of the jurisdiction of the court.<sup>28</sup> The Crown's exploitation of procedural loopholes to keep London alderman Francis Jenkes imprisoned in 1676 after his arrest for sedition—resulting from a speech in which he called for Parliament to be assembled<sup>29</sup>—is an oft-cited example of the abuses that spurred Parliament to pass the Habeas Corpus Act three years later. In that Act, Parliament noted its concern over these denials of bail, noting, "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable."<sup>30</sup>

This Act was successful in strengthening the writ of habeas corpus and closing the procedural gaps in the preceding legislation,

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26. Act of 1641, 1641, 16 Car. 1, c. 10 (Eng.), *reprinted in* 7 THE STATUTES AT LARGE 1763, *supra* note 10.

27. See 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 115 (1926); see also ANTHONY HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL 214 (Dublin 1791).

28. See SCHWOERER, *supra* note 16, at 89–90; Duker, *supra* note 8, at 65.

29. Proceedings Against Mr. Francis Jenkes, for a Speech Made by Him on the Hustings, at Guildhall, in the City of London, on Midsummer-day, *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1189 (London, R. Bagshaw 1810) [hereinafter *Jenkes's Case*].

30. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), *reprinted in* THE STATUTES AT LARGE JAMES II, *supra* note 11; see also SCHWOERER, *supra* note 16, at 90; Duker, *supra* note 8, at 64–65; Foote, *supra* note 3, at 967.

but nonetheless failed to completely curb the abuses it sought to remedy: the royal judges were able to literally comply with the Act yet still deprive royally-accused defendants of their liberty before trial by deliberately setting bail so high that the defendants could not pay.<sup>31</sup> Using the device of “excessive bail, the judges had made the Habeas Corpus Act inoperative with respect to those prisoners whom the King did not want to release.”<sup>32</sup> This, then, led Parliament to include a prohibition against excessive bail in the English Bill of Rights of 1689.

### **C. The Excessive Bail Clause of the English Bill of Rights**

As it became clear that royal judges were using the device of unattainably high bail to thwart the spirit of the Petition of Right and the Habeas Corpus Act, Parliament moved towards a solution: “In December 1680, a committee of the House of Commons appointed to examine the proceedings of the judges in Westminster Hall brought in a report condemning as ‘illegal and a high breach of the liberty of the subject’ the refusing of ‘sufficient’ bail.”<sup>33</sup> Seven members of this committee also went on to sit on the rights committee in 1689,<sup>34</sup> and the tenth clause of the Bill of Rights signed by the newly enthroned William and Mary contained the familiar formula: “That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”<sup>35</sup> Thus, although in a larger sense directed at the sovereign, the excessive bail clause of the English Bill of Rights operated in practice against the judges who had colluded with the Stuarts in holding royal prisoners without trial or bail. This, then, was the origin of the clause that, in a slightly altered form, crossed the Atlantic and was incorporated into colonial and state law.

### **D. Inclusion in the Bill of Rights**

The excessive bail clause of the English Bill of Rights, after being adopted in several state constitutions, entered the U.S. Bill of Rights with little debate. Although there had been many colonial laws concerning bail,<sup>36</sup> the excessive bail language from the English

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31. See HOLDSWORTH, *supra* note 27, at 118–19; SCHWOERER, *supra* note 16, at 90.

32. Meyer, *supra* note 18, at 1189.

33. SCHWOERER, *supra* note 16, at 90 (quoting 9 H.C. Jour. 692 (1680)).

34. See *id.* (citing 9 H.C. Jour. 661 (1680)).

35. English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), reprinted in 1 THE STATUTES AT LARGE 1704, *supra* note 7, at 1555.

36. For a thorough account of bail in Colonial America, see Duker, *supra* note 8, at 77–81.



Bill of Rights first appeared in America in June 1776, when the Virginia Legislature adopted it verbatim in the Virginia Declaration of Rights.<sup>37</sup> Similar wording was subsequently adopted in the revolutionary era constitutions of several other states.<sup>38</sup> While ratifying the Constitution, several states urged the adoption of a prohibition against excessive bail as part of a bill of rights, and when James Madison proposed amendments in the House of Representatives in 1789, he included, with the substitution of “shall” for “ought,” the prohibition against excessive bail (as well as excessive fines and cruel and unusual punishment) from the English Bill of Rights and the Declaration of Rights of his home state.<sup>39</sup>

However much congressional debate surrounded passage of the Eighth Amendment, very little of this debate is recorded. The only known remark addressing the proposed Excessive Bail Clause came from Mr. Livermore in the House of Representatives as part of a comment on the Eighth Amendment as a whole. In only a few words, he presaged the difficult question of interpretation that the Supreme Court would address almost 200 years later in *Salerno*: “The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?”<sup>40</sup> Unfortunately, this comment apparently sparked no further debate, and a large majority subsequently approved the amendment.<sup>41</sup> The Representatives may have declined to address Mr. Livermore’s concerns because they knew exactly what the Clause meant but could not be bothered to explain it. Alternatively, some, like Mr. Livermore, might not have known the precise meaning of the Clause but also did not object to it on account of its “humanity.” Or perhaps they had entirely different reasons. Without more evidence, however, the explanations for this lack of debate are a matter of pure speculation.

### E. Other Bail Provisions in Early America

The excessive bail clause from the English Bill of Rights was, perhaps unsurprisingly, not the only strand of English bail law to

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37. See Foote, *supra* note 3, at 983.

38. See *id.*

39. *Id.*; see also Duker, *supra* note 8, at 83–84.

40. 1 ANNALS OF CONG. 754 (Joseph Gales & William Seaton eds., 1834), reprinted in 5 THE FOUNDERS’ CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

41. Foote, *supra* note 3, at 986.

influence colonial and revolutionary drafters: the Statute of Westminster I<sup>42</sup> and other English statutory provisions, as well as the common law as it had developed, were also important, and were adapted for use in colonial, state, and federal laws.<sup>43</sup> The Frame of Government of Pennsylvania of 1682—seven years before the passage of the English Bill of Rights—provided in section XI of the Laws Agreed Upon in England “[t]hat all prisoners shall beailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great.”<sup>44</sup> The following year, this provision served as the pattern for the bail provision in the New York Charter of Liberties and Privileges of 1683, which reads, in part, “[that] in all cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unlesse for treason or felony plainly and specially Expressed and menconed in the warrant of Commitment.”<sup>45</sup>

The Pennsylvania Frame of Government of 1682 also served as a model for the Northwest Ordinance passed by the Continental Congress in 1787,<sup>46</sup> which provided that “[a]ll persons shall beailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted.”<sup>47</sup> This ordinance is especially interesting because, as Professor Foote notes, while its bail provision is taken from the Pennsylvania law, its prohibitions against immoderate fines and cruel or unusual punishments are adapted from the English Bill of Rights.<sup>48</sup> Foote speculates that the drafter, an experienced lawyer, may have concluded that declaring all personsailable “included by necessary implication the requirement that bail be reasonable.”<sup>49</sup> Whatever the precise motivation for combining the two strands of bail law in this way, they were both incorporated—this time unmixed—into the law of the

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42. Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.), reprinted in 1 *THE STATUTES AT LARGE* 1704, *supra* note 7.

43. For a more comprehensive account of early American bail laws, see Duker, *supra* note 8, at 77–83.

44. Meyer, *supra* note 18, at 1163 (quoting 5 FRANCIS N. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES* 3052, 3061 (1909)).

45. Meyer, *supra* note 18, at 1163 (quoting 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 95 (1906)).

46. Northwest Ordinance, 1 Stat. 50 (1787).

47. *Id.* art. 2, at 52.

48. Foote, *supra* note 3, at 987. See the discussion of Professor Foote’s interpretation of the Eighth Amendment’s excessive bail clause, Part II.C.2, *infra*.

49. Foote, *supra* note 3, at 987.

new republic two years later with the passage of the Bill of Rights and the Federal Judiciary Act of 1789.

As we have already seen, the Excessive Bail Clause of the United States Bill of Rights is borrowed more or less directly from its English counterpart. In contrast, the Judiciary Act, though it was before the House when debate began on the proposed constitutional amendments,<sup>50</sup> contains no trace of the language adopted 100 years earlier in the English Bill of Rights. It has, instead, less ambiguous language:

And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.<sup>51</sup>

Although the wording has been altered and the subject matter expanded, the Judiciary Act's bail provision clearly has its roots in the Westminster Statute/Pennsylvania Frame of Government line of Anglo-American bail law.

These, then, in brief form, are the origins of the Excessive Bail Clause of the Eighth Amendment and other sources of federal bail law through the adoption of the Bill of Rights. Even simplified and abbreviated, it is a somewhat complex and obscure history. This complexity, combined with the Clause's extreme brevity, has made consensus over the precise function of the constitutional prohibition against excessive bail elusive.

## II. INTERPRETATION OF THE EXCESSIVE BAIL CLAUSE BEFORE *SALERNO*

Although there was some difference of opinion, before the Supreme Court's decision in *Salerno* a majority of courts and commentators believed that bail was excessive within the meaning of the Eighth Amendment when set at "an amount beyond that necessary to secure appearance."<sup>52</sup> There was no such agreement,

50. Duker, *supra* note 8, at 85.

51. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

52. Duker, *supra* note 8, at 90 (citing *Stack v. Boyle*, 342 U.S. 1, 5 (1951) and collecting cases); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1948 (Melville M. Bigelow, ed., 5th ed. Little, Brown 1891) ("An accused party is always to be presumed innocent until proved guilty; and though he may be arrested and detained until investigation can be had, he is neverthe-

however, about whether the Excessive Bail Clause binds only the courts and leaves the legislature a completely free hand, or whether it binds Congress as well. A further debate among modern commentators centers on whether the Clause creates a substantive right to bail, and, if so,<sup>53</sup> what is the scope of this putative right.

### A. Early Commentators

Not reaching the question of a right to bail, early constitutional scholars were divided on the issue of whether the Excessive Bail Clause binds the legislature, as can be seen by examining two prominent nineteenth century treatises published only a few years apart. In the first, William Rawle's *A View of the Constitution of the United States*, the passage on the Excessive Bail Clause suggests that the author considered the Clause to be effective only against the courts:

During the arbitrary reigns of the Stuarts in Britain, particularly of the two last, one frequent mode of oppressing those who were obnoxious to the court, was to cause criminal proceedings to be instituted against them, to demand bail in extravagant sums, and on their failing to procure it, to commit them to prison.

When the revolution took place, among other provisions demanded by the people, and readily assented to by William III was the clause which has been transcribed into this amendment. If excessive bail is demanded by one magistrate, another may

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less entitled, in all except capital cases, to choose his keepers if he shall give sufficient security that they shall produce him at the proper time for trial. Excessive bail must, therefore, not be required; and the just import of this is, *that only sufficient should be demanded to render the production of the accused for trial reasonably certain.*") (emphasis added); Tribe, *An Ounce of Detention*, *supra* note 1, at 400–01. There is, however, a debate in the pre-*Salerno* courts and in the literature over whether dangerousness is a proper factor to consider when setting bail. See, e.g., Alschuler, *supra* note 5; John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969); Tribe, *An Ounce of Detention*, *supra* note 1. However, since the argument is not made that demanding a greater sum would deter defendants from committing crimes while released on bail except by keeping them in jail for lack of funds, detention for dangerousness will be analyzed herein as a denial of bail. See, e.g., *Nail v. Slayton*, 353 F. Supp. 1013, 1019 (W.D. Va. 1972) ("While the right to bail is guaranteed by the Eighth Amendment, neither this amendment nor the Fourteenth Amendment require that everyone charged with a crime be released on bail pending his trial. . . . A trial judge may deny bail if he feels that the release of the accused will endanger the community.").

53. Adherents of this view would presumably also hold the Excessive Bail Clause operative against the Executive branch were it in a position to set bail.

moderate it on a *habeas corpus*, issued to the keeper of the prison in whose custody the party is.<sup>54</sup>

The author's treatment of the application of the Excessive Fines Clause in the subsequent paragraphs provides contrast:

This restriction [against excessive fines] applies equally to the legislative and to the judicial authority. In respect to the former, however, it is rather to be considered in the light of a recommendation than as a condition on which the constitutionality of the law depends. The judicial authority would not undertake to pronounce a law void, because the fine it imposed appeared to them excessive; and, therefore, if the legislature should commit, and persist in, gross errors in this respect, the ultimate remedy must be sought among the checks on the legislative power . . .<sup>55</sup>

Thus, for Rawle, while the Excessive Fines Clause "applies equally" to Congress and the courts, at least in the form of a suggestion, the Bail Clause operates only against the judicial branch.

Justice Joseph Story's account of the Clause in *Commentaries on the Constitution of the United States*, however, takes the opposite position. According to Story, the English predecessors of the Eighth Amendment's prohibition against excessive bail imposed limitations on Parliament as well as the Crown and the royal judges:

In England, the bills of rights were not demanded merely of the crown, as withdrawing a power from the royal prerogative; they were equally important, as withdrawing power from parliament. A large proportion of the most valuable of the provisions in Magna Charta, and the bill of rights in 1688, consists of a solemn recognition, of limitations upon the power of parliament; that is, a declaration, that parliament *ought* not to abolish, or restrict those rights. Such are the right of trial by jury; the right to personal liberty and private property according to the law of the land . . . and that excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.<sup>56</sup>

Whatever the historical merits of Justice Story's view of the effectiveness of the English Bill of Rights against Parliament, it is important as a reflection of early thought on the origins of the

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54. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 130-32 (2d ed. 1829), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 40, at 387.

55. *Id.*

56. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1858 (Boston, Hilliard, Gray 1833).

Eighth Amendment, and it clearly influenced Story's account of the Excessive Bail Clause:

The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct. It was, however, adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. In those times, a demand of excessive bail was often made against persons, who were odious to the court, and its favourites; and on failing to procure it, they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted.<sup>57</sup>

According to Justice Story, then, the Excessive Bail Clause was, at the least, "an admonition" to all branches of the new government. While his account of the English Bill of Rights suggests that he may well have considered the Eighth Amendment to limit the power of the legislature, he does not say that this admonition created any substantive right to bail.

As we have seen, there was already disagreement over the proper application of the Excessive Bail Clause by the 1830s. This difference of opinion was not limited to scholars, but extended to the courts as well.

## **B. Pre-Salerno Court decisions**

Until the Supreme Court's decision in *Salerno*, both advocates and opponents of finding a limit on Congress and a substantive right to bail in the Excessive Bail Clause could find support from the courts.<sup>58</sup> This support included dicta from a pair of early 1950s Supreme Court decisions.

### **1. *Stack v. Boyle***

In *Stack v. Boyle*,<sup>59</sup> the petitioners, charged under the Smith Act,<sup>60</sup> challenged their bail, which had been set at \$50,000, as excessive under the Eighth Amendment. Because petitioners had a statutory right to bail, the Court did not need to consider whether

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57. *Id.* § 1896.

58. See Tribe, *An Ounce of Detention*, *supra* note 1, at 399 nn.117–18 (collecting cases).

59. 342 U.S. 1 (1951).

60. Smith Act, ch. 439, 54 Stat. 670, 670-76 (1940) (current version at 18 U.S.C. § 2385 (2006)).

the Excessive Bail Clause created any right to bail under the Constitution. Nonetheless, the Court observed that the “traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>61</sup> While certainly not conclusive, this statement suggests the Supreme Court considered the right to bail to be protected by the Constitution. Only a few months later, however, the Court reversed its dicta course.

## 2. *Carlson v. Landon*

In *Carlson*, a 5-4 majority found that alien communists facing deportation could be denied bail.<sup>62</sup> In reaching this conclusion, Justice Reed, writing for the Court, suggested that the Excessive Bail Clause applies only to the judiciary and affords no right to bail. The Court first noted that:

[t]he bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.<sup>63</sup>

The Court went on to add: “[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. . . . Indeed, the very language of the Amendment fails to say all arrests must be bailable.”<sup>64</sup> Despite the Court’s eagerness to comment on the issue, however, *Carlson* was a civil case, and its actual holding was limited to its particular statutory circumstances.<sup>65</sup> Thus, at the Supreme Court level, the issue of whether the Excessive Bail Clause applies to Congress and creates a constitutional right to bail rested until *Salerno*.

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61. *Stack*, 342 U.S. at 4 (internal citation omitted).

62. 342 U.S. 524 (1952).

63. *Id.* at 545.

64. *Id.* at 545-46 (internal citations omitted).

65. *See id.* at 546 (“We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.”).

### C. Modern Scholarly Opinion Before *Salerno*

The Excessive Bail Clause became a focus of scholarly interest<sup>66</sup> in the 1960s as a result of the possibilities created by the Supreme Court's new authority over state criminal procedure through the doctrine of incorporation. Congressional interest in preventive detention measures, beginning with the Nixon administration's proposal in 1969, created further interest.<sup>67</sup> Much of the resulting debate focused on whether the Clause creates a substantive right to bail and, if so, the extent of that right. Three main positions developed<sup>68</sup> and will be explored here: (1) that the Excessive Bail Clause binds only the courts and imparts no substantive right to bail; (2) that the Clause binds Congress as well and grants a right to bail in all noncapital cases; and (3) that the Clause binds Congress as well and grants a right to bail when pretrial imprisonment is not necessary to protect the government's interest in prosecuting the defendant.

#### 1. *The Argument that the Excessive Bail Clause Binds Only the Courts and Grants No Right to Bail*

Put forth by, among others, Nixon Attorney General John Mitchell,<sup>69</sup> Hermine Meyer, an attorney in the Office of the Deputy Attorney General under Nixon; and William Duker, this historically based argument is essentially that of the Court's *Carlson v. Landon* dictum. The Excessive Bail Clause of the Eighth Amendment is based on the similar clause in the English Bill of Rights, the argument goes, and the English clause did not itself grant a right to bail; rather it merely prevented judges from circumventing bail rights granted by other provisions of law.<sup>70</sup> Further, the Framers were "familiar with English law and English legal history,"<sup>71</sup> and intentionally replicated the structure of the English bail safeguards by including "the excessive bail clause to prevent obstruction of the Habeas Corpus Act in the eighth amendment."<sup>72</sup>

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66. See, e.g., RONALD GOLDFARB, *RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM* (1965); Foote, *supra* note 3; Mitchell, *supra* note 52; Tribe, *An Ounce of Detention*, *supra* note 1.

67. 27 CONG. Q. WKLY. REP. 238 (Feb. 7, 1969). Nixon's preventive detention proposal is, in many ways, the direct ancestor of the Bail Reform Act, and the two have many common features.

68. See Tribe, *An Ounce of Detention*, *supra* note 1, at 399, 403.

69. Mitchell, *supra* note 52.

70. See discussion *supra* Part II.A–C.

71. Meyer, *supra* note 18, at 1190 (internal citation omitted).

72. *Id.*



According to this interpretation, then, the Clause “does no more than prohibit the setting of excessive bail in cases prescribed bailable . . . requir[ing] the legislation of Congress creating the right to bail to lend it sustenance” and is “not self-executing.”<sup>73</sup> Proponents of this position point to the fact that the language of the Clause does not explicitly create a right to bail<sup>74</sup> and contrast this ambiguity with the Judiciary Act of 1789’s clear provision for bail in all noncapital cases: clearly, they argue, the authors of the Bill of Rights knew how to create a right to bail and could have done so if they had so intended.<sup>75</sup> Finally, as opponents of a constitutional right to bail note, there cannot be an absolute right to bail—and Congress is free to define which classes of cases should be bailable<sup>76</sup>—since the Judiciary Act left bail decisions in capital cases to judges’ discretion.<sup>77</sup>

2. *The Argument that the Excessive Bail Clause Binds Both Congress and the Courts and Grants a Right to Bail in All Noncapital Cases*

One version of this argument, made in dissenting opinions in *Carlson*, is that the Excessive Bail Clause must imply a constitutional right to bail by logical implication.<sup>78</sup> According to Justice Murton, “[t]he Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing.”<sup>79</sup>

Similarly, Justice Black, while acknowledging that “the literal language of the framers” may “lend[ ] itself to this weird, devitalizing interpretation when scrutinized with a hostile eye,” concluded that reading the Excessive Bail Clause as “a limitation upon judges only” would reduce it “below the level of a pious admonition.”<sup>80</sup> In response to the argument for limitation only on judicial discretion based on the function of the excessive bail clause in the English bail clause, Black notes, “[t]he Eighth Amendment is in the

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73. Duker, *supra* note 8, at 86 (internal citations omitted).

74. See *Carlson v. Landon*, 342 U.S. 541, 545-46 (1952).

75. See Meyer, *supra* note 18, at 1179.

76. See Mitchell, *supra* note 52, at 1225; see also *Carlson*, 342 U.S. at 545.

77. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

78. See Foote, *supra* note 3, at 970.

79. *Carlson*, 342 U.S. at 569 (Murton, J., dissenting).

80. *Id.* at 556 (Black, J., dissenting).

American Bill of Rights of 1789, not the English Bill of Rights of 1689,” and that the American version was written to secure greater rights than had been enjoyed in Europe.<sup>81</sup> Developing the implications of this relatively non-controversial assertion further, Foote argues that “to construe the Eighth Amendment as not providing a constitutional right to bail secure against legislative abridgement flies in the face of everything we know about the purpose of the Bill of Rights as a whole.”<sup>82</sup>

Black and Murton do not deal with the question of why the Founders, if they intended to create a right to bail, failed to do so more clearly. Setting himself to this task, Foote suggests a historical accident. He points out that George Mason, who authored both the Virginia Declaration of Rights and the suggested constitutional amendments from the Virginia ratifying committee, was not a trained lawyer.<sup>83</sup> Therefore, according to Foote, Mason, unlike the lawyer author of the Northwest Ordinance,<sup>84</sup> failed to appreciate the structure of English bail law and so, thinking it unnecessary, did not include an explicit right to bail in either document.<sup>85</sup> Thereafter, “Mason’s mistake, if such it was,” was “carried forward with so little discussion that the latent ambiguity of the clause was never noticed.”<sup>86</sup> Thus, according to Foote, the Excessive Bail Clause was intended to convey the right to bail in noncapital cases found in the Judiciary Act of 1789 and should be so interpreted.<sup>87</sup>

3. *The Argument that the Excessive Bail Clause Binds Both Congress and the Courts and Grants a Right to Bail when Pretrial Imprisonment is not Necessary for Effective Prosecution*

The author of this position, Laurence Tribe, like Foote and Black, starts by rejecting the *Carlson* position that the Excessive Bail Clause limits only judicial discretion. He bases this argument on the grounds that though “an unlimited legislative power to define the boundaries of the citizen’s rights may be consistent enough

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81. *See id.* at 557.

82. Foote, *supra* note 3, at 988.

83. *See id.* at 984–85.

84. *See* discussion *supra* Part I.E.

85. *See* Foote, *supra* note 3, at 986.

86. *Id.*

87. As Foote notes, however, there is no direct evidence to support this theory. For him it is one part of a larger circumstantial argument based on the general trend of English and American bail law at the time the Eighth Amendment was drafted as well as the structure of the Bill of Rights. *See id.* at 989.

with the English theory of civil liberties, in which Parliament is the ultimate authority, such power would be totally inconsistent” with the almost exclusive concern of the Bill of Rights with limiting congressional powers.<sup>88</sup> Further, he argues, such an interpretation would “make no functional sense” because the governmental and individual interests at stake are unchanged regardless of whether a court or Congress is denying bail, and because the Due Process Clause would “render the excessive bail clause superfluous” under such a reading.<sup>89</sup>

Having thus concluded that the Eighth Amendment does convey a right to bail, Tribe argues that the scope of this right must be determined by “an examination of the contemporary purposes of the clause,” since our “incomplete knowledge” of the history of bail and the expectations of the Framers makes deducing the scope of the right from history “exceedingly hazardous.”<sup>90</sup> This contemporary purpose, Tribe argues, is the protection of the presumption of innocence mentioned by the Court in *Stack*.<sup>91</sup> This presumption of innocence “represents a commitment to the proposition that a man who stands accused of a crime is no less entitled than his accuser to freedom and respect as an innocent member of the community.”<sup>92</sup> Therefore, Tribe concludes, the Excessive Bail Clause prohibits “imprisonment that is not needed to effectuate the government’s interest in prosecuting [a defendant] to determine his guilt or innocence.”<sup>93</sup> This conception of the right to bail, then, is similar to that espoused by Foote, Black, and Murton (among others), but specifically allows for detention to prevent the subversion of the trial process through, for example, flight, intimidation of the jury or witnesses, and destruction of evidence.<sup>94</sup>

These, then, were the three main interpretations of the Excessive Bail Clause in the scholarly literature before the Supreme Court addressed the issue directly for the first time as part of the constitutional challenge to the Bail Reform Act of 1984 in *Salerno*.

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88. Tribe, *An Ounce of Detention*, *supra* note 1, at 400 (internal citation omitted).

89. *Id.* at 399–400.

90. *Id.* at 402.

91. 342 U.S. 1, 4 (1951).

92. Tribe, *An Ounce of Detention*, *supra* note 1, at 404.

93. *Id.* at 405.

94. *Id.* at 406 (internal citations omitted).

### III. THE BAIL REFORM ACT OF 1984

The history of federal bail legislation goes back to the Judiciary Act of 1789, in which, as seen above, Congress mandated that bail be granted to all defendants accused of noncapital crimes.<sup>95</sup> This remained the rule in all federal courts until 1970, when, at the urging of the Nixon administration, the national legislature altered the law of the District of Columbia to allow the pretrial detention of noncapital defendants on the grounds that their release would pose a danger to the community.<sup>96</sup> This law survived a constitutional challenge in the District of Columbia courts,<sup>97</sup> and, in 1982, the Supreme Court denied certiorari.<sup>98</sup> Building off this success, Congress passed the structurally similar Bail Reform Act of 1984<sup>99</sup> (“BRA”).

#### A. Alternatives to Detention

In its current form, the BRA first mandates that release on recognizance be granted if the court finds no additional requirements necessary to produce the defendant and protect public and individual safety:

The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.<sup>100</sup>

When the court finds that a recognizance bond alone will not “reasonably assure” that these objectives will be met, however, 18 U.S.C. § 3142(c) allows judges to not only require a monetary surety,<sup>101</sup> but also provides them with a long list of conditions they can place on pretrial release.<sup>102</sup>

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95. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

96. Alschuler, *supra* note 5, at 512 & n.3.

97. *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981).

98. *United States v. Edwards*, 455 U.S. 1022 (1982).

99. Federal Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (2006).

100. *Id.* § 3142(b).

101. The sub rosa use of a monetary bond to deny bail is explicitly prohibited by section 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”).

102. *See* 18 U.S.C. § 3142(c)(1). These conditions include, among others, requiring the defendant to: remain in the custody of a third party; maintain or seek a job or educational program; comply with restrictions on travel, living arrangements, and personal associations; avoid contact with the victim and witnesses; report to law enforce-

In addition, the BRA authorizes judges to mandate “any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.”<sup>103</sup> If the court does choose to set a financial condition, under § 3142(c)(2) it may not “impose a financial condition that results in the pretrial detention of the person.”<sup>104</sup> Courts of appeal for at least two circuits have held that if the defendant protests that the trial court has set bail higher than he can pay, the trial court must provide a reasoned explanation for its arrival at the disputed figure.<sup>105</sup>

### B. Defendants Eligible for Pretrial Detention

A wide array of criminal defendants is eligible for detention under the BRA. The government may move for a detention hearing in cases that involve: (1) “a crime of violence” or certain crimes of terrorism;<sup>106</sup> (2) a charge punishable by death or life imprisonment; (3) a federal drug charge punishable by ten or more years imprisonment; (4) any felony charge if the defendant has already been convicted of two or more crimes in the first three categories or comparable state and local offenses, or a combination thereof; or (5) any felony that involves a minor victim or use of a firearm or other dangerous weapon.<sup>107</sup> In addition, both the gov-

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ment or other designated authorities; obey a curfew; not possess weapons; not use controlled substances or excessive alcohol; undergo medical or psychiatric treatment, including institutional treatment; and remain in custody except for specified purposes, such as work or school. *Id.*

103. *Id.*

104. This does not mean, however, that courts must set bail at an amount that defendants can actually afford. See DAVID N. ADAIR, JR., FED. JUDICIAL CTR., THE BAIL REFORM ACT OF 1984, at 3 (3d ed. 2006) (citing *United States v. Mantecon-Zayas*, 949 F.2d 548, 550–51 (1st Cir. 1991) (holding that section 3142(c)(2) prohibits only “‘sub rosa use of money bond’ to detain defendants whom the court considers dangerous”) (internal citations omitted)); see also *United States v. McConnell*, 842 F.2d 105, 108–10 (5th Cir. 1988) (en banc); *United States v. Wong-Alvarez*, 779 F.2d 583, 584 (11th Cir. 1985) (per curiam); *United States v. Jessup*, 757 F.2d 378, 388–89 (1st Cir. 1985), *abrogated on other grounds by* *United States v. O’Brien*, 895 F.2d 810 (1st Cir. 1990). As the Eleventh Circuit explained in *Jessup*, if the court sets bail at the amount it finds necessary to assure the defendant’s appearance but which is higher than the defendant can afford, the defendant will be detained “not because he cannot raise the money, but because without the money, the risk of flight is too great.” *Jessup*, 757 F.2d at 389.

105. See *Jessup*, 757 F.2d at 389 (citing *Mantecon-Zayas*, 949 F.2d at 55); accord *McConnell*, 842 F.2d at 110.

106. The list of terrorism-related crimes is found in 18 U.S.C.A. § 2332b(g)(5)(B) (West 2007).

107. 18 U.S.C. § 3142(f)(1) (2006).

ernment and the court may move for a hearing if there is a serious risk that the defendant will flee or threaten, intimidate, or injure jurors or otherwise obstruct justice.<sup>108</sup> If, after a hearing, the court finds that its broad power to set conditions on release is, like a recognizance bond, insufficient to reasonably assure the defendant's appearance and the safety of any other individual and the community, the BRA requires that the court deny the defendant bail or any other form of pretrial release.<sup>109</sup> For the purposes of the BRA, 18 U.S.C. § 3156(a)(4) defines a "crime of violence" as:

(A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or

(C) any felony under chapter 109A, 110, or 117.<sup>110</sup>

This definition, which does not require that the illegal use (or attempted or threatened use) of force rise to the level of a felony, covers a broad swath of crimes. As Professor Alschuler notes, the BRA's definition of crimes of violence "treats the use of force against property no differently from the use of force against a person; and if seizing a person is a crime of violence, perhaps larceny—seizing property—is a crime of violence as well."<sup>111</sup> No matter how broad the definition is, however, the court must decide whether the offense a defendant is charged with is a crime of violence by considering in the abstract the crime with which the defendant is charged, rather than by examining the individual circumstances of the defendant's case.<sup>112</sup>

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108. *Id.* § 3142(f)(2).

109. *Id.* § 3142(e).

110. *Id.* § 3156(a)(4). Chapters 109A, 110, and 117 contain certain sexual offenses involving children. *Id.* §§ 2241, 2251, 2421.

111. Alschuler, *supra* note 5, at 512 n.7. As further evidence of the broad sweep of the BRA's conception of crimes of violence, Alschuler cites *United States v. Yeaple*, 605 F. Supp. 85, 87 (M.D. Pa. 1985), in which the court held that possessing child pornography might be a crime of violence, since creating the demand for such materials indirectly leads to the violence (although arguably psychological rather than physical) done to the victims. See *Yeaple*, 605 F. Supp. at 87. But see *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) (vacating detention order because receiving child pornography "is not in and of itself a crime of violence").

112. See, e.g., *United States v. Bowers*, 432 F.3d 518, 521 (3d Cir. 2005).

### C. The Detention Decision

If a defendant is indeed eligible for detention under the BRA, the court, after a hearing, must consider a multitude of factors in determining whether to detain the defendant. Once the court grants the government's motion for a detention hearing (which it will as long as it finds that the case meets the statutory requirements) or moves for a hearing itself, the hearing must be held at the defendant's first appearance unless either the defendant or the government requests a continuance.<sup>113</sup> At the detention hearing, the defendant has the right to counsel (and to appointed counsel), to testify, present witnesses,<sup>114</sup> cross-examine opposing witness, and present information by proffer.<sup>115</sup> The rules of evidence do not apply, however.<sup>116</sup> Further, when the government has chosen to proceed by proffer, several circuits have held that, at least in the absence of a specific proffer of how cross-examination might aid the defendant, the court is not required to grant requests to subpoena government witnesses.<sup>117</sup>

After the hearing, the judicial officer must decide whether to order the defendant detained before trial. She must order detention if she finds, by clear and convincing evidence,<sup>118</sup> that no combination of the apparently limitless conditions she could set on the defendant's pretrial release would reasonably assure the defendant's presence at trial and the safety of individuals and the community.<sup>119</sup> In reaching this decision, the B.R.A. directs judicial officers to take into account the available information on the following broad range of factors:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of

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113. 18 U.S.C. § 3142(f) (2006). In *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990), the Supreme Court held that "a failure to comply with the first appearance requirement does not defeat the Government's authority to seek detention of the person charged." Thus, defendants may still be detained before trial if the government fails to comply with section 3142(f), although they may have "other remedies." *Montalvo-Murillo*, 495 U.S. at 720-21.

114. The Third Circuit has held that a court may require the defendant to proceed by proffer rather than by live testimony. *United States v. Delker*, 757 F.2d 1390, 1395-96 (3d Cir. 1985). The Seventh Circuit, however, reached the opposite conclusion in *United States v. Torres*, 929 F.2d 291, 292 (7th Cir. 1991).

115. See § 3142(f).

116. See *id.*

117. See *ADAIR*, *supra* note 104, at 23 (citing *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v. Winsor*, 785 F.2d 755, 756-57 (9th Cir. 1986); *Delker*, 757 F.2d at 1397-98).

118. § 3142(f).

119. See *supra* note 102.

terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including –

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history,<sup>120</sup> and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. . . .<sup>121</sup>

The BRA itself does not provide any guidance as to which, if any, of these factors should carry the most weight; the Ninth Circuit has, however, stated that “the weight of the evidence is the least important of the factors,”<sup>122</sup> and the Seventh Circuit<sup>123</sup> has said that trial judges must not completely disregard any of them.<sup>124</sup>

Similarly, the BRA does not define danger; the legislative history does suggest, however, that Congress considers drug trafficking dangerous to communities.<sup>125</sup> The Third Circuit interprets the danger factor as requiring a finding that the defendant is likely to commit one of the crimes enumerated in § 3142(f),<sup>126</sup> while the Ninth Circuit, on the other hand, allows detention on the basis of economic danger.<sup>127</sup>

In addition to these factors, the BRA creates rebuttable presumptions for a finding that no conditions of release could assure

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120. The First Circuit has held that prior arrests not leading to conviction may be considered as part of criminal history. *See United States v. Acevedo-Ramos*, 755 F.2d 203, 209 (1st Cir. 1985).

121. 18 U.S.C. § 3142(g) (2006).

122. *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).

123. *United States v. Torres*, 929 F.2d 291 (7th Cir. 1991).

124. *ADAIR*, *supra* note 104, at 7.

125. *See id.* at 8 (citing S. REP. NO. 98–225, at 12–13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3195–96).

126. *See id.* at 8–9 (citing *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986)).

127. *See id.* at 8 n.42 (citing *United States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992)) (“[A] defendant convicted of mail fraud . . . posed an economic or pecuniary danger to the community.”).



the defendant's appearance and the safety of the community for two classes of defendants: (1) those who have, within the previous five years, been convicted of or completed a prison sentence for a crime committed while out on bail; and (2) those who the judicial officer finds probable cause to believe have used a firearm to commit federal drug offenses carrying a ten-year minimum penalty, certain terrorism offenses, or certain sexual offenses involving minors.<sup>128</sup>

### D. Appeal

Appeal from pretrial detention is available, although the standard of review varies widely among the circuit courts of appeal. If the judicial officer orders a defendant into pretrial detention, she must include written findings of fact and a statement of reasons for the detention in her order.<sup>129</sup> This order, if issued by a magistrate judge, is subject to de novo review by the district court judge.<sup>130</sup> Defendants may also seek review in the court of appeals, but here there is a split among the circuits as to the appropriate standard of review. The Sixth,<sup>131</sup> Seventh,<sup>132</sup> Eighth,<sup>133</sup> Ninth,<sup>134</sup> Tenth,<sup>135</sup> and Eleventh<sup>136</sup> Circuits are the most rigorous, and engage in de novo review of the trial court's decision while deferring to specific factual findings. In contrast, the Second<sup>137</sup> and Fourth<sup>138</sup> Circuits, which review for clear error, along with the Fifth Circuit, which will uphold a trial court's decision as long as "it is supported by the proceedings below,"<sup>139</sup> give the most credence to the trial court's

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128. See 18 U.S.C. § 3142(e) (2006). This presumption shifts the burden of production but not the burden of persuasion, although it still retains evidentiary weight after the defendant has met his burden. See *United States v. Hare*, 873 F.2d 796, 798 (5th Cir. 1989).

129. See 18 U.S.C. § 3142(i)(1) (2006). The order must also include, among other things, a directive that the defendant be held "to the extent practicable" separate from convicted prisoners, *id.* § 3142(i)(2), and that the defendant "be afforded reasonable opportunity for private consultation with counsel." *Id.* § 3142(i)(3).

130. See, e.g., *United States v. Reuben*, 974 F.2d 580, 585 (5th Cir. 1992).

131. See *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985).

132. See *United States v. Portes*, 786 F.2d 758, 762 (7th Cir. 1985).

133. See *United States v. Cantu*, 935 F.2d 950, 952 (8th Cir. 1991).

134. See *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

135. See *United States v. Montalvo-Murillo*, 876 F.2d 826, 830 (10th Cir. 1989), *rev'd on other grounds*, 495 U.S. 711, 722 (1990).

136. See *United States v. Hurtado*, 779 F.2d 1467, 1471-72 (11th Cir. 1985).

137. See *United States v. Ferranti*, 66 F.3d 540, 542 (2d Cir. 1995).

138. See *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc).

139. *United States v. Aron*, 904 F.2d 221, 223 (5th Cir. 1990) (internal quotations omitted).

findings. The First<sup>140</sup> and Third<sup>141</sup> Circuits fall in between, reviewing the trial court's decision independently, but with some deference.<sup>142</sup>

#### IV. THE *SALERNO* COURT'S BAIL ANALYSIS AND SUBSEQUENT DEVELOPMENTS IN THE LITERATURE

The BRA survived a constitutional challenge on due process and Eighth Amendment grounds in *United States v. Salerno*. As part of his Excessive Bail Clause analysis, Chief Justice Rehnquist, writing for the Court, resolved 198 years of jurisprudential uncertainty by rejecting any meaningful substantive right to bail and strongly suggesting that the Clause applied only to the judiciary. This section will, after briefly providing the case's factual and procedural background, examine the majority's analysis along with Justice Marshall's dissent before concluding with a discussion of subsequent developments in the scholarly literature.

##### A. Factual and Procedural Background

In *Salerno*, the respondents, Anthony Salerno and Vincent Cafaro, were charged with multiple RICO violations. They were denied bail after a hearing under the Bail Reform Act—in which the government showed that the respondents were a “boss” and “captain,” respectively, in an organized crime family—on the grounds that no condition of release would assure the safety of the community and any individual.<sup>143</sup> On appeal, the Second Circuit invalidated their detention on the grounds that the Bail Reform Act was a facially unconstitutional violation of due process.<sup>144</sup> The Supreme Court granted certiorari, and after finding no due process violation,<sup>145</sup> rejected the respondents' Eighth Amendment arguments.

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140. See *United States v. O'Brien*, 895 F.2d 810, 813 (1st Cir. 1990).

141. See *United States v. Traitz*, 807 F.2d 322, 325 (3d Cir. 1986).

142. See *ADAIR*, *supra* note 104, at 35.

143. *United States v. Salerno*, 481 U.S. 739, 743 (1987). Justice Marshall's dissent raises substantial doubts as to whether this “test case” sought by the government presented a live case or controversy, since Salerno was convicted in a separate proceeding but allowed to remain free on bail pending the outcome of this case, while Cafaro had been released on bail after agreeing to work as an informant for the government. See *id.* at 756–59 (Marshall, J., dissenting).

144. *United States v. Salerno*, 794 F.2d 64, 66 (2d Cir. 1986).

145. *Salerno*, 481 U.S. at 745–52.

## B. The Majority's Excessive Bail Clause Analysis

The respondents, basing their argument on the passage in *Stack v. Boyle* in which the Court stated that “bail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment,”<sup>146</sup> maintained that the Bail Reform Act violates the Excessive Bail Clause because it “allows a court essentially to set bail at an infinite amount for reasons not related to risk of flight.”<sup>147</sup> This, as discussed above, is essentially the position put forth by Laurence Tribe, among others.<sup>148</sup>

Rehnquist rejects this argument, distinguishing *Stack* on the grounds that it was concerned with the issue of whether bail, guaranteed to the defendant by statute, was set at an excessively high level by the trial court.<sup>149</sup> He then quotes *Carlson* at length for the proposition that the Eighth Amendment does not prohibit Congress from determining which classes of cases shall be bailable, calling that case “remarkably similar to the present action.”<sup>150</sup> After noting that *Carlson* was a civil case, however, Rehnquist stops short of holding that the Excessive Bail Clause places no substantive restrictions on Congress. Instead, he concludes—without any analysis—that since the Court would uphold the BRA under “[t]he only arguable substantive limitation of the Bail Clause[,] that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil,” the Court does not have to decide whether this lone possible substantive limit exists.<sup>151</sup>

Thus, under current law, if the Excessive Bail Clause creates any right to bail at all, it is limited to situations in which the government fails to put forth a sufficiently strong interest. Since, as Professor Alschuler notes, those arrested for “tipping over garbage cans” are eligible for detention under the Bail Reform Act, the scope of this possible substantive right would seem to be very broad.<sup>152</sup>

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146. *Id.* at 752 (quoting *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

147. *Id.* at 752–53.

148. See discussion *supra* Part II.C.3.

149. *Salerno*, 481 U.S. at 753.

150. *Id.* at 753–54 (citing *Carlson v. Landon*, 342 U.S. 524, 529 (1952)).

151. *Id.* at 754. The Court had already described the government’s interest in safeguarding the community and individuals as compelling. See *id.* at 753.

152. Alschuler, *supra* note 5, at 512.

### C. Bail Clause Analysis in Marshall's Dissent

In a very strongly worded dissent, Justice Marshall, joined by Justice Brennan, attacks the majority's suggestion that the Excessive Bail Clause limits only judicial discretion. Pointing out the selective nature of Rehnquist's textualism, Marshall notes that "[t]he text of the Amendment . . . provides absolutely no support for the majority's speculation that both courts and Congress are forbidden to inflict cruel and unusual punishments, while only the courts are forbidden to require excessive bail."<sup>153</sup> Countering the majority's argument from *Carlson* that the English Bill of Rights did not limit the discretion of Parliament, Marshall, like Justice Black in that case and Foote and Tribe after him,<sup>154</sup> takes the position that the U.S. Bill of Rights protects the "rights of the people against infringement by the Legislature, and its provisions, whatever their origins, are interpreted in relation to those purposes."<sup>155</sup>

Having thus concluded, like Tribe, that the Eighth Amendment limits the government's powers of pretrial detention to those necessary to prevent trial from being "evaded or obstructed,"<sup>156</sup> Marshall makes the argument that the language of the Amendment logically implies a right to bail. He declares that "it would be mere sophistry" to argue that the Excessive Bail Clause prevents the government from setting excessively high bail but not from refusing to set bail at all, since "the consequences are indistinguishable."<sup>157</sup>

Marshall goes on to argue that the Excessive Bail Clause protects the presumption of innocence, and prohibits Congress from furthering its interest in crime prevention and public safety through detention before conviction.<sup>158</sup> Otherwise, he argues, the government's power to punish and coerce before proving its case will be too strong. Noting that respondent Cafaro was originally detained due to dangerousness and subsequently granted bail only after agreeing to become a "covert agent" for the government, Marshall argues that "[t]here could be no more eloquent demonstration of

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153. *Salerno*, 481 U.S. at 761. The majority states that "[n]othing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight." *Id.* at 754.

154. See discussion of Foote and Tribe's arguments, *supra* Part II.C.2-3.

155. *Salerno*, 481 U.S. at 761 n.5 (Marshall, J., dissenting).

156. *Id.* at 765.

157. *Id.* at 761.

158. See *id.* at 762-67. Marshall quotes *Stack* for the proposition that bail is essential to the preservation of the presumption of innocence. See *id.* at 766 (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951)).

the coercive powers of authority” and its “almost inevitable abuses” than the facts of the case itself.<sup>159</sup>

#### D. Subsequent Bail Scholarship

In the years since the Court’s decision in *Salerno* rendered the Excessive Bail Clause a near nullity, there has been, perhaps not surprisingly, relatively little written on the bail provision of the Eighth Amendment. What scholarship there is has generally either taken up some combination of the arguments in Justice Marshall’s *Salerno* dissent<sup>160</sup> or accepted the majority’s interpretation and abandoned the Clause as a meaningful source of law.<sup>161</sup>

One interesting if somewhat undeveloped exception is the work of Laurence Claus.<sup>162</sup> Claus, while focusing primarily on the Eighth Amendment’s prohibition against cruel and unusual punishments, argues that, based on the Amendment’s English origins in the politically and religiously motivated abuses of the Stuarts,<sup>163</sup> the purpose of the Amendment is to “prohibit discriminatory punishment.”<sup>164</sup> Claus, therefore, would apply an Equal Protection Clause analysis to determine whether the Eighth Amendment has been violated.<sup>165</sup> Although the Excessive Bail Clause gets little direct consideration, Claus’s conclusions about the Eighth Amendment presumably encompass its bail provision.

#### V. THE BAIL REFORM ACT AND THE HISTORIC PURPOSE AND CORE PRINCIPLES OF THE EXCESSIVE BAIL CLAUSE

This Part argues that the Excessive Bail Clause, as interpreted in *Salerno*, no longer serves its core purpose. It analyzes the unconstitutionality of the Act following a two step process. First, the meaning of the Excessive Bail Clause must be discovered, looking to the historic abuses underlying the clause and the essential nature of those abuses. Second, it must be determined whether the Bail

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159. *Id.* at 766–67.

160. See, e.g., Michael J. Eason, Case Note, *United States v. Salerno*, 107 S. Ct. 2095 (1987); *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048 (1988); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 18–22 (2005).

161. See, e.g., Miller & Guggenheim, *supra* note 6, at 356.

162. See Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119 (2004).

163. See *id.* at 135–43.

164. See *id.* at 162.

165. See *id.*

Reform Act's preventive detention provisions—and the Court's decision in *Salerno*—square with these core principles.

In seeking to discern the purpose of—and the protections provided by—the Excessive Bail Clause by looking to its roots in the abuses that inspired the Clause's predecessor in the English Bill of Rights and the founders' decision to adopt the English text in nearly unaltered form, the approach taken here resembles other scholars' purposive and historic theories of constitutional interpretation and applies some of the principles underlying these theories to the underdeveloped field of bail.<sup>166</sup>

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166. This approach most closely resembles Professor Jed Rubenfeld's "paradigm case method" under an "Application Understanding" of the Constitution. Rubenfeld identifies two basic types of constitutional understandings: "Application Understandings," wherein courts identify "specific understandings of what a constitutional right prohibits," and "No-Application Understandings," which merely identify what a constitutional right does not prohibit. JED RUBENFELD, *REVOLUTION BY JUDICIARY* 14 (2005) [hereinafter RUBENFELD, *REVOLUTION*]. Under an "Application Understanding," courts identify the "paradigm case" that embodies the core prohibitions of a constitutional right and the commitment embodied within the paradigm case. *Id.* at 15-19. From this commitment, the courts "are to derive doctrinal rules" and apply them "evenhandedly to subsequent cases." JED RUBENFELD, *FREEDOM AND TIME* 190 (2001) [hereinafter RUBENFELD, *FREEDOM*]. The discussion in this Article also has traces of Akhil Amar's approach to constitutional interpretation, what he describes as "documentarian[ ] first, and doctrinalist[ ] second," but it more strongly emphasizes the importance of using the historical context surrounding the writing and adoption of constitutional provisions to understand their meaning and modern application. Akhil Reed Amar, *The Supreme Court, 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182, 1185 (1991) (discussing the "historical connection between the First and Eighth Amendments" and the latter's role in preventing judicial acquiescence in "government tyranny"); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286-89 (1987) (discussing the need to consider the "primary sources from the ratification period," which "comprise the People's legislative history of the People's law"). Finally, my approach resembles portions of theories that look to the purposes for the adoption of constitutional text at the time of its adoption. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 (1973) ("Surely the Court is entitled, indeed I think it is obligated, to seek out the sorts of evils the framers meant to combat and to move against their twentieth century counterparts."); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254, 256 (1972) (discussing how "constitutional rules are applications of prior political law making" that "reflect a series of decisions concerning the organization of government, its powers, and limitations that were made by particular men at particular moments in history," and emphasizing the importance of constitutional interpretation as a "most serious inquiry into historic constitutional imperatives"). My theory is both "originalist," in its reliance on the historic context of a constitutional provision, and "nonoriginalist" in its focus on the purpose of the original adoption of the text—equitable treatment, for example—and the application of that purpose to modern circumstances. See, e.g., Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1628-29 (1989) (arguing that theories of originalism and nonoriginalism intersect because "[t]hey seek the truths that the Con-

The original motivation for the Eighth Amendment's prohibition against excessive bail is fairly clear. As we have seen, that provision passed almost unchanged from the English Bill of Rights of 1689, through the Virginia Declaration of Rights, into the U.S. Bill of Rights.<sup>167</sup> The abuse it was originally drafted to cure was well known to the Founders<sup>168</sup>: the effective denial of pretrial release<sup>169</sup> by the King and his judges to keep imprisoned his (or their) political and religious enemies, and, as seen in *Darnel's Case*,<sup>170</sup> to force these enemies to capitulate to his demands.

The protection of criminal defendants against those abuses, then, was the immediate purpose of the Excessive Bail Clause, but the analysis does not end there. To avoid an overly limited understanding of the Clause, we must inquire further: why was the effective denial of bail (for indeed, hollow semantic quibbles aside, the Stuart judges were denying bail) to the King's targets so abhorrent to the Founders and their English forebears?<sup>171</sup> What was the core of the problem they sought to address?

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stitution conveys to us" and that "[t]here is a close connection between the nonoriginalist notion that the Constitution should be viewed as a charter establishing justice, and the originalist notion that the Constitution must be interpreted to advance the fundamental principles and values of the framers and ratifiers"). Solum uses *New York Times Co. v. Sullivan* as an example, where the "nonoriginalist" Brennan drew "on the framers' and ratifiers' understanding of the freedom of speech, crystallized by the Alien and Sedition Acts, in order to take us back to the fundamental aspiration or central meaning of the first amendment," a view "recognized by the conservative proponents of originalism." *Id.* at 1628 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)); see also Edwin Meese, *The Battle for the Constitution*, 35 POL'Y REV. 32 (1985).

167. See discussion *supra* Part I.D.

168. See RAWLE, *supra* note 54, and accompanying text; Meyer, *supra* note 18, at 1190 ("The men who made the United States Constitution were familiar with English law and English legal history."); see also discussion *supra* Part III.A.

169. See SCHWOERER, *supra* note 16, at 90 ("[J]udges evaded [Habeas Corpus]' purpose by setting bail so high that the prisoner was unable to raise the sum, in effect, denying him the right to bail.").

170. See discussion *supra* Part I.A.

171. See RUBENFELD, *REVOLUTION*, *supra* note 166, at 25–26 ("[R]easoning from paradigm cases has to offer an explanation of why the paradigm cases are paradigm cases: what was it about the [paradigmatic abuses] that made them core violations?"); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230, 234 (1988) (discussing how judges interpreting the Constitution must "apply the rules of the written constitution in the sense in which those rules were understood by the people who enacted them" and arguing that the constitution's "force derives from the historical and political events surrounding its creation and the regard in which those events were and continue to be held"); Laurence Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future – or Reveal the Structure of the Present?* 113 HARV. L. REV. 110, 121 (1999) (discussing, in a more recent historic analysis,

I suggest that the answer is that bail was being denied for reasons the drafters of the Clause thought illegitimate: political, religious, or *personal* reasons. Contrasting these practices with the standard bail procedure of the time illustrates the “paradigmatic”<sup>172</sup> nature of this arbitrary, discriminatory<sup>173</sup> abuse: generally, the legislature decided whether whole classes of defendants were bailable—based on perceived risk of flight,<sup>174</sup> dangerousness,<sup>175</sup> or whatever other broadly applicable reason—on the basis of the crimes of which they were accused, and the judges<sup>176</sup> would neutrally apply these criteria.<sup>177</sup> Thus, the bail charged by the Stuart judges was “excessive” not in relation to the King’s interests, but because Parliament judged those individualized interests to be illegitimate, and the sums demanded could not be justified by any rule of broad applicability. The great wrong the Stuart judges committed and that the Excessive Bail Clause prevented, then, is that they denied bail to defendants—personally, discriminatorily—based on *who they were* (used broadly to encompass beliefs, associations, or unwillingness to conform to the King’s extralegal demands) rather than—impersonally, impartially—on *what they were accused of doing*.<sup>178</sup>

The purpose embodied in the text of Excessive Bail Clause, therefore, is to prevent discrimination in pretrial detention by requiring that the decision whether or not to grant bail be made without consideration of individual characteristics, even if they might be, in a literal sense, relevant to the decision.<sup>179</sup> In short, then, it

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“[p]aradigmatic examples of government practices that evoked the brand of equal protection strict scrutiny”).

172. See RUBENFELD, *REVOLUTION*, *supra* note 166, at 25.

173. See Claus, *supra* note 162, at 138.

174. See, e.g., 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*297 (explaining the presumption against bail for capital defendants: “For what is there a man might not be induced to forfeit, to save his own life?”).

175. See, e.g., HIGHMORE, *supra* note 27, at vii (noting that Parliament created the presumption against bail for capital defendants so “that the safety of the people should be preserved against the lawless depredations of atrocious offenders”), *quoted in* Alschuler, *supra* note 5, at 550.

176. The term “judges” is used broadly here to include justices of the peace and other bail-granting officers.

177. See Statute of Westminster, *supra* note 7.

178. Cf. AKHIL REED AMAR, *THE BILL OF RIGHTS* 82 (1998) (“More so than the takings clause, most other provisions of Amendments V–VIII were centrally concerned with the agency problem—the danger that government officials might attempt to rule in their own self-interest at the expense of their constituents’ sentiments and liberty.”).

179. The fact that Jenkes was calling for a new Parliament was apparently quite relevant to the government’s decision to deny him bail.



grants criminal defendants the right to blind justice in detention decisions. This is a commitment not only to antidiscrimination in bail in the broad sense as described by Professor Claus,<sup>180</sup> but also, more specifically to non-tyrannical criminal procedure<sup>181</sup>: preventing the government from discriminating against a class of people from whom the government wants something—by using the threat of pretrial detention (or the reward of bail)—to coerce defendants to capitulate to its demands, whether to give the King a loan as in *Darnel*, to stop agitating for a new Parliament as in *Jenkes*, or to become a government informant, as in *Salerno*.<sup>182</sup>

This protection against coercion and discrimination, as I have described it, cannot be applicable only to the judiciary. Not only would such an interpretation be generally inconsistent, as many have noted, with the principles of constitutional analysis,<sup>183</sup> but would specifically fail to honor the core principles of the Eighth Amendment: the abuses of the Stuart judges would not, by any reasonable measure, be somehow more palatable if authorized against Catholics and Royalists by a rogue Parliament.

Before examining whether the BRA is consistent with the broad purposes of the Eighth Amendment, a pair of possible objections. First, someone might object, courts consider personal characteristics—financial, familial, residential—all the time when setting bail, and have done so since before the passage of the English Bill of Rights. How can this be consistent with a prohibition against basing bail decisions on who people are? The response is simple: it is quite appropriate for judges to consider these characteristics when deciding on the quantum of bail to demand—indeed, the proper functioning of the bail system requires that they do so. It is only when the decision not to grant bail at all is based on personal details that the Excessive Bail Clause is violated. Note, however, that this does not mean a court necessarily violates the Excessive Bail Clause when it sets bail at a level higher than a defendant can afford. It may be that the amount necessary to secure appearance at

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180. See Claus, *supra* note 162.

181. See AMAR, *supra* note 178, at 82 (the Constitution aimed to prevent government's interference with "constituents' sentiments and liberty"); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 102 (2008).

182. Cf. *United States v. Salerno*, 481 U.S. 739, 766–67 (1987) (Marshall, J., dissenting) (finding that the power of government to imprison on prediction is coercive). The line between antidiscrimination and anti-coercion is often indistinct. If the King is locking up Protestants because he dislikes Protestants, this may not be entirely aimless: he may be trying to coerce people into abandoning Protestantism.

183. See, e.g., *id.* at 761; see also discussion *supra* Parts II.C.2–3, IV.C.

or non-obstruction of trial is greater than that which the defendant can raise.<sup>184</sup>

The second objection might appear more serious: how is the practice—found in both England in 1689 and the United States in 1789—of allowing judges broad discretion to grant bail or not in capital cases consistent with the Eight Amendment’s core principles of antidiscrimination and anti-coercion? The response is two-fold. At the outset, it may be worth noting explicitly that these principles do not grant a right to bail in all cases: the legislature may, consistent with making bail decisions without reference to personal characteristics, deny bail to all armed robbers, for example, because it considers them to be flight risks or because the danger of allowing the guilty ones out on the street outweighs the interests of the class (including the innocent) in pretrial liberty.<sup>185</sup> With that in mind, the fact that Parliament and, later, Congress chose, while creating a presumption against bail for capital offenses, to create a safety valve of judicial discretion in an age when jail conditions were frequently appalling<sup>186</sup> does not conflict with antidiscriminatory principles: any discrimination by the judges could have no worse result than the detention the legislature presumed was the correct decision.

The second and perhaps more important response to this objection<sup>187</sup> is that the discretion delegated to judges in capital cases was not unbounded: as Professor Alschuler convincingly argues, these decisions were to be made on the strength of the proof against the defendant. The default was no bail, but, as Highmore explains, bail was “regularly to be allowed in such cases wherein it seems doubtful whether the person accused be guilty or not.”<sup>188</sup> This practice was embodied not only in the Pennsylvania Frame of Government

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184. See discussion *supra* Part III.A. It may be of little comfort to the defendant so denied bail to know that his Eighth Amendment rights are being respected, but his complaint is more properly addressed to the bail system as a whole than at the interpretation of the Excessive Bail Clause put forth here.

185. Of course, if Congress were to deny bail to all suspects, there would be a likely due process violation.

186. See, e.g., BLACKSTONE, *supra* note 174, at \*300 (“[G]aolers . . . are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation.”).

187. A third response would be that judicial discretion in capital cases represents a Non-Application Understanding and can therefore be disregarded as being a mere intention.

188. HIGHMORE, *supra* note 27, at 152 (emphasis omitted), *quoted in* Alschuler, *supra* note 5, at 555.

of 1682,<sup>189</sup> which predates the English Bill of Rights, but also the Judiciary Act of 1789, which requires judges to consider “the nature and circumstances of the offense, and of the evidence, and the usages of law” when exercising their discretion in capital cases.<sup>190</sup> Evaluating the strength of the evidence against a defendant does not require any knowledge or consideration of his personal characteristics: it concerns, rather, what a defendant is accused of and not who he is as a person. It does not, therefore, open the door to use of the bail system for political purposes.

To recapitulate before moving on, I have argued that the core purpose of the Excessive Bail Clause was the prevention of the abuse and manipulation of the bail system by the Stuart Kings and their royal judges and that that provision requires that courts avoid discrimination in decisions to grant bail by prohibiting the consideration of defendants’ personal characteristics—those factors, that is, concerned with who defendants are as individuals, rather than the generic, interchangeable fact that they are accused of a particular sort of crime. Finally, then, we can consider whether the BRA is consistent with this purpose.

#### **A. Antidiscrimination, Anti-Coercion, and the Bail Reform Act of 1984**

As the reader may have guessed, the BRA’s pretrial detention procedures would be clearly impermissible under the Excessive Bail Clause as analyzed above. As an initial matter, there is, under this view, no Eighth Amendment problem with Congress detaining whole classes of defendants to prevent jury tampering or to protect society from the danger of having the guilty among them at large before trial.<sup>191</sup> Thus, for example, if the BRA simply denied bail to all defendants currently eligible for a detention hearing under § 3142(f),<sup>192</sup> those defendants would all be treated equally and impersonally, and the antidiscrimination and anti-coercion principles would not be violated.

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189. Frame of Government of Pennsylvania, at Laws Agreed Upon in England, art. XI, reprinted in 5 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3052, 3061 (1909).

190. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

191. There may well, of course, be a due process problem. Or perhaps, according to the Supreme Court, there would not. See, e.g., *United States v. Salerno*, 481 U.S. 739, 745–52 (1987).

192. See discussion *supra* Part III.B.

Detention for dangerousness in the BRA, however, is not administered impartially to whole classes of defendants. Nor is it, like flight risk, a necessarily individualized factor in the setting of bail. Rather, dangerousness in the BRA is an individual criterion for denying bail and is therefore prohibited by the antidiscrimination and anti-coercion principles set forth above. Thus the BRA directs judges to do exactly what the Excessive Bail Clause was designed to forbid: decide whether to grant bail based on defendants' personal attributes, such as their "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, [and] history relating to drug or alcohol abuse," along with their "history and characteristics" generally.<sup>193</sup> While these factors may be appropriate when considering how *much* bail will be necessary to ensure the defendant's appearance, they, along with the exceptionally vague "nature and seriousness of the danger to any person or the community that would be posed" by release factor,<sup>194</sup> are not appropriate for determining the threshold question of whether or not to consider granting bail to a defendant.

Because they are different and less likely to arouse the sympathy or understanding of prosecutors and judges, those outside the mainstream of society—the unemployed, those belonging to organizations the government considers suspect, and those with ideas outlandish enough to cause their mental condition to be questioned—are precisely the people most in need of blind justice. The Framers, with their knowledge of English history, understood this. But far from observing the protections embodied in the Excessive Bail Clause, the BRA instead overtly encourages, or perhaps demands, explicit bail discrimination against "outsiders." This discrimination has far reaching consequences: the ability of extended pre-trial detention to induce guilty pleas—thus augmenting the government's ability to incarcerate suspects without a trial to test the strength of its case—is well established.<sup>195</sup>

In addition, of course, the vagueness of the personal characteristics factors generally and the dangerousness factor in particular allows a tremendous amount of latitude for racial and other types of

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193. 18 U.S.C. § 3142(g) (2006); see discussion *supra* Part III.C.

194. § 3142(g).

195. See, e.g., HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 220–27 (1982) (discussing the ability of judges and prosecutors to induce guilty pleas from detained defendants through a time-served plea—this effect is presumably strengthened by the BRA, which makes pretrial detention more common).

clearly prohibited discrimination; with a laundry list of vague factors to choose from, any reasonably competent judge or prosecutor would be able to justify the detention of almost any defendant while disguising his real motives—and there is reason to believe the government has taken advantage.<sup>196</sup> With the ability to strongly influence the pre-trial process, as Justice Marshall noted in his *Salerno* dissent,<sup>197</sup> the government is well-positioned under the BRA to use, both openly and covertly, the threat of detention or the reward of bail to coerce its targets. The ability of a judge to delve into the most private areas of one's life while making a bail determination may, like other activities that encourage government "omniscience," be "one of the most effective tools of tyranny," grand or petty.<sup>198</sup>

### CONCLUSION

Since the 1984 Bail Reform Act, the number of pretrial detentions has, as might be expected, risen steadily. In 1984, prior to its passage, 26% of federal defendants were detained prior to trial.<sup>199</sup> Between January and June of 1986, approximately 31% of criminal defendants were detained prior to trial under the Act.<sup>200</sup> From October 1, 2002, to September 30, 2003, 64% of the 83,419 defendants with cases beginning in that year were detained prior to trial.<sup>201</sup>

Examining the history of the Excessive Bail Clause and its central purpose, this Article has argued that many of these detentions—along with the Bail Reform Act of 1984 itself—are unconstitutional because they are based on the consideration of exactly the sort of individual characteristics to which the Eighth Amendment demands we be blind.

The interpretation adopted by the Supreme Court (building on the *Carlson* dictum<sup>202</sup>) when upholding the BRA in *Salerno* cannot

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196. See, e.g., Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 376 (1994) (finding a disproportionate increase of Hispanic defendants detained under the BRA).

197. See discussion *supra* Part IV.C.

198. *Lopez v. United States*, 373 U.S. 427, 466 (1963).

199. U.S. GEN. ACCOUNTING OFFICE, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 3, 8 (1987), available at <http://archive.gao.gov/d29t5/134489.pdf> (investigating cases from January through June, 1984).

200. *Id.* at 8, 15.

201. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 42, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0303.pdf>.

202. See discussion *supra* Part II.B.2. In *Carlson v. Landon*, 342 U.S. 524 (1952), where alien communists were denied bail before a deportation hearing because the

be justified under any meaningful approach that recognizes the Amendment's historic grounding in anti-coercive and anti-discriminatory principles. The "only arguable substantive limitation" the *Salerno* Court could imagine in the Excessive Bail Clause—"that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil"—will not prevent the specific abuse the Clause was adopted to prevent: denial of bail seems quite reasonable when considered in light of a governmental interest in obtaining essential war funds<sup>203</sup> or preventing the disruption of government.<sup>204</sup> Using the bail process to punish individuals for actions believed to run counter to these interests is acceptable under the *Salerno* standard yet violates the Clause's core principles.

The detention criteria of the Bail Reform Act permit, and perhaps encourage, judges and prosecutors to allow government discrimination and coercion in pretrial detention decisions. Though not yet prophetic, Justice Marshall's description of the Supreme Court's decision in *Salerno* is wholly merited: "[t]heirs is truly a decision which will go forth without authority, and come back without respect."<sup>205</sup>

A renewed discussion of the Bail Reform Act is necessary, both in the literature and Congressional and judicial decisionmaking, to revive the most basic protections of the Excessive Bail Clause. Congress must develop principles that allow adequate public protection but prevent bail decisions based on discretionary determinations of an individual's character, determinations which allow the government, consciously or unconsciously, to punish those defendants who (non-criminally) fail to conform. Absent thorough reconsideration of the unlimited and unconstitutional discretion authorized in the Act, the detention criteria of the Bail Reform Act will continue to allow, and perhaps encourage, judges and prosecutors to violate the Founders' prohibition against government discrimination and coercion in pretrial detention decisions.

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Attorney General believed communists and their ideas were dangerous, is certainly wrongly decided under the Excessive Bail Clause as analyzed here.

203. See discussion of *Darnel's Case*, *supra* Part I.A.

204. See discussion of *Jenkes's Case*, *supra* Part I.B.

205. *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).

